

QUINN EMANUEL URQUHART & SULLIVAN, LLP

Ryan S. Goldstein (Bar No. 208444)

ryangoldstein@quinnemanuel.com

Daniel C. Posner (Bar No. 232009)

dانposner@quinnemanuel.com

Zachary A. Schenkkan (Bar No. 304738)

zackschenkkan@quinnemanuel.com

865 South Figueroa Street, 10th Floor

Los Angeles, California 90017-2543

Telephone: (213) 443-3000

Facsimile: (213) 443-3100

Attorneys for TSUBURAYA

PRODUCTIONS CO. LTD.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UM CORPORATION, a Japanese
corporation,

Plaintiff,

vs.

TSUBURAYA PRODUCTIONS CO.,
LTD., a Japanese corporation,

Defendant.

CASE NO. 2:15-cv-03764-AB-AJW

**TSUBURAYA PRODUCTIONS CO.,
LTD.'S RESPONSE TO UM
CORPORATION'S EVIDENTIARY
OBJECTIONS TO DECLARATION
OF TOSHIKI IIMURA (Dkt. 157)**

Date: July 24, 2017

Time: 10:00 a.m.

Location: Courtroom 7B

Judge: Hon. André Birotte, Jr.

Trial Date: November 7, 2017

quinn emanuel

1 TSUBURAYA PRODUCTIONS CO.,
2 LTD., a Japanese corporation,

3
4 Counterclaimant,

5 vs.

6 UM CORPORATION, a Japanese
7 corporation; ULTRAMAN USA, INC.,
8 a California corporation; SOMPOTE
9 SAENGDUENCHAI, a Thai individual;
10 GOLDEN MEDIA GROUP, INC., a
11 California corporation; TIGA
12 ENTERTAINMENT COMPANY,
13 LTD., a Hong Kong corporation; and
14 DOES 1-10,

15
16 Counterdefendants.
17
18
19
20
21
22
23
24
25
26
27
28

Defendant and counterclaimant Tsuburaya Productions Co., Ltd. (“TPC”) hereby responds to UM Corporation (“UMC”)’s Evidentiary Objections To Declaration of Toshiaki Iimura (Dkt. 157).

Preliminary Statement

TPC offered the declaration of Toshiaki Iimura, who formerly served as the presiding judge on Japan’s Intellectual Property High Court, to assist the Court in understanding the relevant judgments from Japan interpreting the 1976 Document, which is the core issue raised by TPC’s motion for summary judgment. ***UMC has not disputed the substance of any of Judge Iimura’s explanations of those judgments.*** (See UMC’s Response to TPC’s Statement of Uncontroverted Facts (Dkt. 151) Nos. 7-8, 10-13, 21.) UMC nevertheless filed 19 pages of “objections” to the Iimura Declaration. These objections are meritless—and only highlight UMC’s desire to avoid the Japanese rulings that the 1976 Document did not transfer any rights in derivative Ultraman works. Under Federal Rule of Civil Procedure 44.1—which UMC cites ***nowhere*** in its lengthy objections—this Court may consider the Iimura Declaration in determining Japanese law even if it is not “admissible” under the Federal Rules of Evidence. UMC’s objections based on those rules do not apply.

Moreover, because former Judge Iimura is offering testimony under Rule 44.1, UMC’s means of “challenging” his opinions is by explaining why they are wrong—not objecting to their admissibility. Given that UMC does not dispute that Judge Iimura’s opinions are ***correct***, however, there should be no issue at all with the Court’s consideration of them. UMC’s “objections” thus serve no purpose other than to impose unnecessary burdens on the Court and on TPC. Indeed, even if Judge Iimura’s declaration were stricken altogether, nothing of substance would change, because his opinions are also embodied in the Japanese courts’ judgments themselves, which TPC attached to its unopposed Request for Judicial Notice. Whether the relevant Japanese law is determined based on the underlying

quinn emanuel

1 judgments, the Iimura Declaration (which was offered to aid the Court in
2 understanding those judgments), or both, the result is the same, because there is no
3 dispute about the Japanese courts' interpretation of the 1976 Document.

4 UMC's "objections" based on Japanese ethical and procedural rules likewise
5 fail. These rules facially apply to a former judge's **representation** of a party as an
6 attorney/advocate—not to his service as an expert witness providing sworn
7 testimony on the meaning of foreign law under Rule 44.1. Indeed, interpreting and
8 explaining the law—which is all Judge Iimura did here—is a judge's ultimate
9 responsibility. Judge Iimura thus neither abdicated his responsibilities to the
10 Japanese legal system nor violated any ethical rules. Moreover, even if any of these
11 ethical or procedural could apply here and were violated, UMC fails to show that
12 Judge Iimura's declaration would be subject to exclusion on that basis.

13 At bottom, UMC cannot dispute that Judge Iimura's accurate descriptions of
14 the judgments from Japan are helpful to the resolution of TPC's motion because
15 they explain the relevant Japanese rulings and obviate, or at least lessen, the need to
16 navigate the lengthy and awkward translations of the Japanese judgments
17 themselves. To the extent this Court finds Judge Iimura's declaration helpful to its
18 understanding of the relevant Japanese law, there is no reason why the Court may
19 not, or should not, consider it. UMC's objections should be overruled.

20 Argument

21 **I. FORMER JUDGE IIMURA'S TESTIMONY REGARDING JAPANESE 22 LAW NEED NOT BE "ADMISSIBLE" EVIDENCE**

23 **A. The Iimura Declaration Is Governed By Fed. R. Civ. P. 44.1**

24 All of UMC's objections to Judge Iimura's declaration should be overruled
25 because his testimony was offered under Rule 44.1, to assist this Court in
26 determining applicable Japanese law. Rule 44.1 allows courts, "in determining
27 foreign law," to "consider any relevant material or source ... whether or not ...
28 admissible under the Federal Rules of Evidence." Fed. R. Civ. P. 44.1. "[P]ursuant

quinn emanuel

1 to Rule 44.1, courts may ascertain foreign law through numerous means, [and]
2 expert testimony accompanied by extracts from foreign legal materials has been and
3 will likely continue to be the basic mode of proving foreign law.” *Universe Sales*
4 *Co., Ltd. v. Silver Castle*, 182 F.3d 1036, 1038 (9th Cir. 1999) (district court erred in
5 declining to consider declaration of Japanese attorney concerning Japanese law,
6 which was “admissible pursuant to Federal Rule of Civil Procedure Rule 44.1”).

7 As the Ninth Circuit recently explained, “Rule 44.1 . . . unshackles courts and
8 litigants from the evidentiary and procedural requirements that apply to factual
9 determinations,” and Rule 44.1’s “requirements are intended to be flexible and
10 informal to encourage the court and counsel to regard the determination of foreign
11 law as a cooperative venture requiring an open and unstructured dialogue among all
12 concerned.” *de Fontbrune v. Wofsy*, 838 F.3d 992, 997, 1000 (9th Cir. 2016)
13 (quotation omitted) (holding that district court may consider material outside the
14 pleadings to determine foreign law on a motion to dismiss under Rule 12(b)(6)).
15 Nor is an “expert witness testifying about foreign law . . . required to meet any
16 special qualifications,” and “[i]ndeed, he need not even be admitted to practice in
17 the country whose law is in issue.” *In re Grand Jury Proceedings*, 40 F.3d 959, 964
18 (9th Cir. 1994) (alteration omitted) (quoting 9A Wright & Miller, *Federal Practice*
19 *& Procedure* § 2444 (3d ed. 2008)).

20 Under Rule 44.1’s liberal standard for determining foreign law, Judge
21 Iimura’s declaration is plainly “admissible” for this Court’s consideration in
22 ascertaining applicable Japanese law, including regarding the meaning of the 1976
23 Document. UMC concedes (Dkt. 157 at 8) that Judge Iimura’s “declaration . . .
24 simply explain[s] what Japanese courts have concluded,” and UMC does not dispute
25 the substance of any of his explanations. Accordingly, Judge Iimura’s declaration is
26 a proper source for determining foreign law under Rule 44.1. The Court should
27 overrule all of UMC’s objections to Judge Iimura’s declaration on this ground alone.
28

B. UMC's Objections Based On the Federal Rules Of Evidence And Procedure Are Misplaced, and Meritless

UMC's many objections based on federal rules of evidence and procedure are inapplicable and have no basis.

First, because Judge Iimura's testimony is offered under Rule 44.1, Federal Rule of Evidence 702 does not apply. *See, e.g., Boosey & Hawkes Music Publishers v. Walt Disney Co.*, 2000 WL 204524, at *1 (S.D.N.Y Feb. 18, 2000) ("[I]n determining issues of foreign law" under Rule 44.1, the court is "not bound by the Rules of Evidence," and expert testimony "need not satisfy" Rule 702); *Siswanto v. Airbus Americas, Inc.*, 2016 WL 7178460, at *4 (N.D. Ill. Dec. 9, 2016) ("Because Rule 44.1 removes admissibility precepts from foreign law determinations, [a foreign law expert] need not possess the special qualifications normally required of factual experts.") (quotation omitted); 9A Wright & Miller, *Fed. Prac. & Proc.* § 2444 (3d ed. 2016) ("Since foreign law is an issue to be determined by the district judge, an expert witness has not been required to meet any special qualifications.").

In addition, this Court's determination of Japanese law "must be treated as a ruling on a question of law," Fed. R. Civ. P. 44.1, and thus whether Judge Iimura's declaration would assist the "trier-of-fact" is immaterial.

Second, UMC's objections based on Rule 403 (Dkt. 157 at 9-11) likewise are misplaced and meritless. "Rule 403 was designed to keep evidence not germane to any issue outside the purview of the jury's consideration," *Schultz v. Butcher*, 24 F.3d 626, 632 (4th Cir. 1994), not the court's consideration in deciding foreign law on summary judgment. Rule 403 also is "inapplicable at the summary judgment stage," even when Rule 44.1 does not apply. *Montoya v. Orange Cty. Sheriff's Dep't*, 987 F. Supp. 2d 981, 994 (C.D. Cal. 2013); *see Bafford v. Travelers Cas. Ins. Co. of Am.*, 2012 WL 5465851, at *8 (E.D. Cal. Nov. 8, 2012) (court "need not exclude evidence at the summary judgment stage for danger of unfair prejudice, confusion of issues, or any of the other grounds outlined in Fed. R. Evid. 403").

1 In any case, UMC's assertions (*see* Dkt. 157 at 4) that Judge Iimura's
2 declaration is unduly prejudicial, or the product of bias, is completely speculative.
3 This purported concern is also belied by UMC's admissions that all Judge Iimura
4 did was given **accurate**, and "unremarkable," testimony regarding the meaning of
5 Japanese law as reflected in the relevant judgments of the Japanese courts. (Dkt.
6 157 at 8, 11.) UMC's concerns about prejudice are unfounded.

7 **Third**, UMC's objections (Dkt. 157 at 8-9) based on the disclosure
8 requirements of Federal Rule of Civil Procedure 26(a)(2)(B)(i) likewise fail. By its
9 terms, Rule 26(a)(2) only applies to experts that a party "may use **at trial** to present
10 evidence." Fed. R. Civ. P. 26(a)(2)(A) (emphasis added). Because Judge Iimura's
11 declaration is offered pursuant to Rule 44.1 to assist this Court's determination of
12 foreign law at the summary judgment stage, it is not subject to Rule 26. *See, e.g.,*
13 *Sosa v. Pfeiffer*, 2013 WL 5204104, at *3 (S.D. Cal. Sept. 16, 2013) ("Defendants
14 offer the opinion of their expert to assist this Court in determining foreign law when
15 ruling on the motion for summary judgment which is permissible under Rule 44.1
16 The opinion is not being offered at trial and therefore, under the plain language of
17 Rule 26(a)(2), is not subject to the disclosure requirement or the report
18 requirement."). In any case, as UMC admits (Dkt. 157 at 8), Judge Iimura stated all
19 his relevant opinions in his previously served expert report.

20 **Fourth**, UMC's scattershot additional objections likewise fail:

- 21 • UMC's "immateriality" objection is not a recognized evidentiary objection.
22 *See Ass'n of California Water Agencies Joint Powers Ins. Auth. v. Ins. Co. of*
23 *the State of Pennsylvania*, 2013 WL 12131357, at *3 (C.D. Cal. Mar. 29,
24 2013) (criticizing parties who "repeatedly object to evidence as irrelevant,
25 immaterial, or both" on summary judgment given that "'immaterial evidence'
26 does not appear in Federal Rule of Evidence 402 and 403, and the phrase
27 smacks of ancient boilerplate").
28

- UMC’s objection for lack of foundation is frivolous, because Judge Iimura is intimately familiar with the Japanese courts’ relevant judgments—one of which he co-authored—and uniquely positioned to explain them to this Court.
- UMC’s “incomplete description” objections (*see* Dkt. 157 at 11-12) are based on Rule 403, which does not apply on summary judgment.

Accordingly, the Court should overrule all of UMC’s objections based on federal rules of evidence and procedure.

II. JAPANESE ETHICAL AND PROCEDURAL RULES DO NOT BAR FORMER JUDGE IIMURA’S TESTIMONY

UMC’s resort to Japanese rules of attorney ethics and procedure likewise provide no basis to strike or limit Judge Iimura’s testimony on foreign law.

A. Japanese Ethical Rules Do Not Apply

UMC incorrectly relies on Article 25 of the Japanese Attorney Act, and Article 27 of the Basic Rules on the Duties of Practicing Attorneys of Japan, to argue (Dkt. 157 at 2) that “ethical standards in Japan ... warrant excluding [Judge Iimura’s] declaration in its entirety.” Neither provisions applies here.

First, UMC has made no showing that either the Japanese Attorney Act or the Basic Rules governing practicing attorneys in Japan could apply in this case—even if they were violated (which they were not)—to restrict the evidence this Court may consider under Rule 44.1. Indeed, UMC has failed to show that the Japanese ethical rules apply *even in Japan* for the purpose of excluding evidence. And even if a violation of those rules could warrant the exclusion of evidence in Japan, then they would be procedural or evidentiary in nature, not substantive, and would not apply in federal court. *See, e.g., In re Sunset Bay Associates*, 944 F.2d 1503, 1508 (9th Cir. 1991) (“Federal law governs the admissibility of evidence for purposes of summary judgment pursuant to Fed. R. Civ. P. 56(e).”); *American Title Ins. Co. v. Lacelaw Corp.*, 861 F.2d 224, 226 (9th Cir. 1988) (“The admissability of evidence . . . is generally a procedural matter governed by the Federal Rules of Evidence.”).

1 Thus, understandably, UMC’s expert on Japanese law, Mr. Ejiri, admitted he was
2 unaware of any case law supporting UMC’s attempt to apply Japanese ethical rules
3 to bar Judge Iimura’s expert testimony on issues of foreign law. (*See* Ejiri Decl.
4 (Dkt. 158) ¶ 10 (“I have found no case law precedent that expressly addresses the
5 current situation presented by the Iimura Declaration”).)

6 Even if UMC could establish that the Japanese ethical rules could govern the
7 admissibility of evidence here and were violated (UMC cannot), UMC has not
8 established that such a violation would result in the wholesale exclusion of Judge
9 Iimura’s declaration. Indeed, whether or not Judge Iimura technically has a conflict
10 under Japanese ethical rules (and UMC has made no showing that he does), that
11 would not affect his competence to testify as to the content of foreign law. *See In re*
12 *Grand Jury Proceedings*, 40 F.3d at 964 (foreign law expert under Rule 44.1 “need
13 not even be admitted to practice in the country whose law is in issue”).

14 Nor, ***second***, is there any basis to conclude that Judge Iimura violated the
15 Japanese rules UMC cites. Article 25 of the Attorney Act and Article 27 of the
16 Basic Rules direct an attorney not to “undertake ... [c]ases” in which they were
17 previously involved as a public officer or servant. These rules are fairly read as
18 prohibiting a former judge from undertaking a case as a lawyer representing, and
19 ***advocating for***, one of the parties to the prior case—not as an expert witness
20 providing sworn testimony in a foreign proceeding regarding matters of foreign law.

21 Moreover, as UMC’s expert concedes, the question whether appearing as an
22 expert in foreign litigation constitutes “undertaking a case” is, at best, a matter of
23 first impression. (*See* Ejiri Decl. (Dkt. 158) ¶ 10.) To the extent Mr. Ejiri himself
24 opined that Judge Iimura’s declaration violated the Attorney Act and the Basic
25 Rules (*see* Ejiri Decl. ¶¶ 10, 13), such a conclusion is an “improper subject of expert
26 testimony on foreign law” under Rule 44.1, and should be disregarded, because
27 foreign law experts may “assist the court in determining the content of applicable
28 foreign law,” but may not “opine as to the ultimate application of the foreign law to

1 the facts of the case.” *EduMoz LLC v. Republic of Mozambique*, 968 F. Supp. 2d
2 1041, 1052-53 (C.D. Cal. 2013) (quoting *Krish v. Balasubramaniam*, 2006 WL
3 2884794, at *3 (E.D. Cal. Oct. 10, 2006)).¹ In any event, because Judge Iimura’s
4 declaration need not be “admissible” under Rule 44.1, this Court need not decide the
5 novel question of whether testifying as an expert on foreign law qualifies as
6 “undertaking a case” for purposes of Japan’s ethics rules.

7 **B. Japanese Procedural Rules Do Not Apply**

8 UMC also wrongly asserts (Dkt. 157 at 3) that Judge Iimura’s testimony is
9 barred by Article 214(1) of the Japanese Code of Civil Procedure, because it is not
10 “sincere expert testimony.” But federal, not Japanese, rules of procedure apply in
11 this case. *See, e.g.*, Fed. R. Civ. P. 1 (Federal Rules “govern the procedure in all
12 civil actions and proceedings in the United States district courts”); *Kearns v. Ford*
13 *Motor Co.*, 567 F.3d 1120, 1125 (9th Cir. 2009) (“It is well-settled that the Federal
14 Rules of Civil Procedure apply in federal court irrespective of the source of subject
15 matter jurisdiction and irrespective of ... the substantive law at issue”) (quotation omitted). Moreover, UMC’s argument that Judge Iimura will not give
16

17
18 ¹ Contrary to Mr. Ejiri’s opinion that Judge Iimura violated Japanese attorney
19 ethics rules, Judge Iimura himself—who applied those rules for years when he was
20 the Presiding Judge of the Intellectual Property High Court of Japan—was
21 unequivocal at his deposition that these Japanese ethics rules are not implicated
22 here. (*See* Posner Reply Declaration (filed herewith), Ex. B (Iimura Tr. at 79:20-
23 80:4 (“Q. Are you undertaking a case that you handled as a public officer? A. I was
24 asked to provide my expert opinion and then create an opinion report as an expert,
25 and I don’t think that runs in conflict with [Article 25 of the Attorney Act].”); *id.*
26 80:16-22 (“Q. Is it your opinion that serving as an expert witness as an attorney
27 regarding legal issues is different than undertaking a case in Article 25 of the
28 Attorney Act? A. I was asked to provide my legal opinion from the legal
standpoint, and I don’t think there is any problem.”); *id.* 82:16-21 (“Q. Do you
believe that your work as an expert witness in this case is compliant with Article 27,
subsection (4) of the Basic Rules and Duties of Practicing Attorneys? A. I do not
believe that I’m restricted by this provision.”).)

1 “sincere expert testimony” is, again, wholly unsupported and belied by the
2 indisputably accurate testimony he actually gave.

3 **III. U.S. ETHICAL RULES AND CANONS OF JUDICIAL CONDUCT DO**
4 **NOT BAR FORMER JUDGE IIMURA’S TESTIMONY**

5 UMC also objects (Dkt. 157 at 5-6) based on Model Rule of Professional
6 Conduct 1.12(a), which prohibits former judges from *representing* a party “in
7 connection with a matter in which the lawyer participated personally and
8 substantially as a judge” without consent. Rule 1.12(a) does not apply here because,
9 as UMC concedes (Dkt. 157 at 5), Judge Iimura “is not counsel of record for TPC in
10 this case,” nor is he otherwise “representing” TPC as a lawyer.²

11 Moreover, even if UMC could show a violation of Rule 1.12(a), it could not
12 show that the exclusion of Judge Iimura’s declaration would be warranted. The
13 Model Rules are clear that “[f]ailure to comply with an obligation or prohibition
14 imposed by a Rule is a basis for invoking the disciplinary process,” and are equally
15 clear that “violation of a Rule does not necessarily warrant *any other*
16 *nondisciplinary remedy*, such as disqualification of a lawyer in pending litigation.”
17 Model Rules of Prof’l Conduct, Scope (Am. Bar. Ass’n 2014) (emphasis added).
18 Violation of a Model Rule thus does not warrant disqualification of an *attorney*
19 found in violation, let alone exclusion of an *expert witness* offered under Rule 44.1.

20 Recognizing that Judge Iimura is not “representing” TPC, UMC argues (Dkt.
21 157 at 6) that “policy considerations” underlying the Code of Conduct for U.S.

22
23 ² The sole case cited by UMC involving Model Rule 1.12(a), *In re City of Los*
24 *Angeles*, merely stated, in *dicta*, that a former judge in returning to private practice
25 is “automatically disqualified” from *representing* someone “in connection with a
26 matter in which the lawyer participated personally and substantially as a judge.”
27 223 F.3d 990, 993 (9th Cir. 2000) (quoting Model Rule 1.12(a)). It says nothing
28 even suggesting that a former judge in another country could not provide expert
testimony concerning the law of that country under Rule 44.1, even to the extent that
law was developed in a separate matter in which the former judge participated.

quinn emanuel

1 judges favor treating Judge Iimura's expert testimony concerning Japanese law as
2 "within the scope of prohibited activities for the former judge." But the Code says
3 nothing of a former federal judge providing expert testimony concerning U.S. law in
4 a foreign proceeding.³ Nor is there anything in Judge Iimura's accurate declaration
5 that could undermine "confidence in the integrity and impartiality of the judiciary."

6 Finally, UMC points (Dkt. 157 at 6-7) to a Model Confidentiality Statement
7 for judicial employees, but this document is meant "to ensure that nonpublic
8 information learned in the course of employment" by judicial employees "is kept
9 confidential." (Rawson Decl. (Dkt. 159), Ex. C at 1.) While UMC suggests (Dkt.
10 157 at 6-7) that Judge Iimura would have had access to "the type of confidential
11 information" outlined in the Model Confidentiality Statement, UMC does not
12 contend that his declaration actually divulges any such information (it plainly does
13 not), and the Model Confidentiality Statement is therefore inapplicable on its face.⁴
14

15 DATED: July 10, 2017

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

17 By /s/ Daniel C. Posner

18 Daniel C. Posner

19 Attorneys for Tsuburaya Productions Co.,
20 Ltd.

21 ³ For the same reason, UMC's argument (Dkt. 157 at 7 & n.2) that it would be
22 "unfathomable for a retired U.S. Circuit Judge to serve in a similar role," fails,
23 because testimony from a retired judge concerning U.S. law in a foreign proceeding
24 would be appropriate if the foreign country had a rule similar to Rule 44.1.

25 ⁴ UMC's argument (Dkt. 157 at 9) that Judge Iimura "is ethically precluded
26 from discussing the three-judge panel's confidential deliberations and the facts
27 considered and weighed by that panel" is also meritless. Because Judge Iimura
28 simply explained the Japanese courts' rulings as expressed in their written
judgments, there is no need for Judge Iimura to address any "confidential
deliberations," and thus no prejudice to UMC even if he were unable to do so.